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Issue Date: 12 April 2006

In the Matter of:
ESTIL E. WALDROOP
Claimant,
v.
ROYAL GEM COAL COMPANY,
Employer,
and
DIRECTOR OFFICE OF WORKER'S COMPENSATION
Party-In-Interest.

CASE NO.: 2003-BLA-6077

DECISION AND ORDER ON REMAND

DENIAL OF CLAIM

This case comes on a request for hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901 *et seq.* (the "Act") (DX 17)[1], dated March 14, 2003.[2]

A hearing was held May 27, 2004, in Harlan, Kentucky. The claimant is represented by Mark L. Ford, Esquire of Harlan, Kentucky. Royal Gem Coal Company (hereinafter the "Employer") is represented by Philip J. Reverman, Jr., Esquire, Boehl, Storper & Graves, Louisville, Kentucky. On November 19, 2004 I entered a Decision and Order denying the claim. I found that although Claimant was able to establish a material change from a prior decision, based on total disability, an element of entitlement previously adjudicated against him, he failed to prove the existence of pneumoconiosis, which is a crucial element of proof. The claim was appealed to the Benefits Review Board ("BRB" or the "Board").

On appeal, claimant contended that I erred in analysis of the medical opinion evidence when I found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Benefits Review Board determined that I did not adequately explain the reasons for discounting Dr. Baker's opinion:

> On the one hand, the administrative law judge was within his discretion to discount Dr. Baker's diagnosis of clinical pneumoconiosis to the extent it was based on a discredited x-ray.... On the other hand, however, there is merit in claimant's argument that the administrative law judge did not explain why the x-ray was apparently "used to discredit Dr. Baker's conclusions not only about radiographic evidence of pneumoconiosis, but also his opinions about legal pneumoconiosis.

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[1] References to "DX" and "CX" refer to the exhibits of the Director and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

[2] And the regulations at 20 C.F.R. Ch. VI, Subch. B (the "Regulations').

I accept that a positive x-ray is not required to establish the existence of legal pneumoconiosis. See 20 C.F.R. §§718.201(a)(2), 718.202(a)(4).

I am also reminded that the Sixth Circuit has held that a medical report in which a doctor considers multiple factors to diagnose a chronic pulmonary impairment related to coal dust exposure should not be characterized as a mere restatement of an x-ray. ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000).

The Benefits Review Board determined that I found that Dr. Baker's report setting forth relevant histories, physical examination findings, and test results was well-documented. Decision and Order at 7, but determined that

> …[I]t is unclear why the administrative law judge found Dr. Baker's opinion to be based mainly on an x-ray reading. Further, considering that Dr. Baker attributed claimant's COPD, chronic bronchitis, and hypoxemia to both smoking and coal dust exposure, we are unable to ascertain the administrative law judge's reason for finding that the effect of smoking "was not adequately addressed by Dr. Baker."

I am also instructed to reconsider Dr. Dahhan's opinion:

> Substantial evidence does not support the administrative law judge's finding that Dr. Dahhan's opinion merited greater weight because Dr. Dahhan reviewed all medical evidence in the record. Review of Dr. Dahhan's medical report discloses that Dr. Dahhan examined and tested claimant, but did not review additional evidence.

Additionally, since I found Dr. Dahhan's opinion "more reasonable" only after discrediting Dr. Baker's opinion as "not well reasoned," and the BRB has instructed me to reconsider Dr. Baker's opinion, I must also reassess the relative credibility of both opinions. Finally, the BRB has instructed me to include Dr. Morgan's opinion in my discussion of the evidence under Section 718.202(a)(4).

DISCUSSION

There are actually three x-ray readings before me in the record. Dr. Dahan performed an x-ray on July 23, 2002. He apparently has the same qualifications as Dr. Baker who found that the x-ray taken January 25, 2002 is positive at 1,0. Dr. Wiot, who has superior qualifications read the same x-ray as 0,1. I find that Dr. Baker's opinion is outweighed numerically and because Dr. Wiot is better qualified than Dr. Baker and he does not substantiate Dr. Baker's opinion. I also note that Dr. Dahan rendered the most recent x-ray and it is negative. As pneumoconiosis is a progressive disease, the fact that the most recent reading of a new x-ray is negative is also a factor for evaluation. The Board found that I was within my discretion to discount Dr. Baker's diagnosis of clinical pneumoconiosis to the extent it was based on a discredited x-ray. Therefore, pneumoconiosis is not established by 20 C.F.R. §§718.202(a)(1).

The Board reminded me and I accept that a positive x-ray is not required to establish the existence of legal pneumoconiosis. See 20 C.F.R. §§718.201(a)(2), 718.202(a)(4)(b).

As there is no biopsy evidence and no showing that any of the presumptions apply, the Claimant has not established the elements on these bases. 20 C.F.R. §§718.202(a)(2) and (a)(3).

Under 20 C.F.R. §§718.202(a)(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Sec. 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical

examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

After a review of the entire record, I again find that Dr. Baker's opinion is well documented but not well reasoned, and therefore the standard set forth by 20 C.F.R. §§718.202(a)(4) is not met. In reviewing my prior decision I note that I did not fully explain my reasoning. The Claimant bears the burden to prove the existence of pneumoconiosis. "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).

I am directed to DX 8, at 16. There Dr. Baker was asked to provide a basis for his opinion that pneumoconiosis exists in this record. He states:

Abnormal chest x-ray and coal dust exposure.

Id.

I note that the reasoning is capsulated in filling out the box on the form contained in DX 8 at 16.

I accept Employer's argument that Dr. Baker did not list any other findings as being the basis for his diagnosis of an occupational lung disease caused by coal mine employment. Instead, as mentioned previously, he specifically listed an "abnormal chest x-ray" as being the first basis for his diagnosis. He listed "coal dust exposure" as a second reason.

It is impossible to reach a conclusion from reading the report that Dr. Baker's opinion relies on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Dr.Baker does not explain how the exposure to coal dust establishes pneumoconiosis. Instead, based on reading the entire report, I find that he relied mainly on the x-ray reading, which is discredited.

The Board reminds me that Dr. Baker attributed claimant's COPD, chronic bronchitis, and hypoxemia to both smoking and coal dust exposure, and states that it was "unable to ascertain [my] reason for finding that the effect of smoking 'was not adequately addressed by Dr. Baker.'"

I should have more accurately stated, "more adequately explained" by Dr. Baker. I find that under the APA, the Claimant must go beyond merely placing evidence into the record, but must show that pneumoconiosis, legal or clinical, is present, and that Dr. Baker's report fails to do so.[3]

I note further that Dr. Baker used the conjunction "and" to join the first and second premise. I infer that he meant that the two reasons are necessary to full exposition of the conclusion and "abnormal chest x-ray and coal dust exposure" are not mutually exclusive of each other.

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[3] An unsupported medical conclusion is not a reasoned diagnosis. ***Fuller v. Gibraltar Corp***., 6 B.L.R. 1-1292 (1984). See also ***Phillips v. Director, OWCP***, 768 F.2d 982 (8th Cir. 1985); ***Smith v. Eastern Coal Co***., 6 B.L.R. 1-1130 (1984); ***Duke v. Director, OWCP***, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); ***Waxman v. Pittsburgh & Midway Coal Co.,*** 4 B.L.R. 1-601 (1982).

After a review of his report, I find that Dr. Baker's opinion is predicated on the positive reading of his x-ray and therefore, I find that his opinion is not well reasoned.

I find that the Claimant failed to provide a rational explanation for a pneumoconiosis finding through Dr. Baker's report and therefore, the Claimant has failed to establish pneumoconiosis because the evidence is insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985). Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. ***Clark v. Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (1989)(en banc). An unreasoned or undocumented opinion may be given little or no weight. Id.

Alternatively, I find that Dr. Dahhan's opinion is more credible than Dr. Baker's opinion because Dr. Dahhan's x-ray reading is more consistent with my findings regarding the x-ray readings.

Dr. Dahhan determined, based on the occupational, clinical, radiological and physiological evaluation, within a reasonable degree of medical certainty, the following:

1. There are insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis based on the obstructive abnormalities on clinical examination of the chest, obstructive abnormalities on pulmonary function testing, adequate blood gas exchange mechanisms and negative x-ray reading for pneumoconiosis.
2. Mr. Waldroop has chronic obstructive lung disease.
3. From a respiratory standpoint, Mr. Waldroop does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand.
4. Mr. Waldroop's pulmonary disability has resulted from his lengthy smoking habit with no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

He accepts that there is now evidence of total disability, but he attributes it to smoking.

First I accept that Dr. Dahhan's report is more thorough than Dr. Baker's.

Second, I attribute greater credit to Dr. Dahhan's opinion, because he relies on an accurate reading of the chest x-ray.

Third, I attribute greater credit to Dr. Dahhan's report because he does differentiate between smoking and pneumoconiosis. Claimant argues that the opinion is well reasoned "since there is no means of separating" the effect of coal dust exposure and smoking. Actually, Dr. Baker's report does not explain how the laboratory findings in any way establish pneumoconiosis.

Spirometry and blood gas studies presented in Dr. Baker's report do not indicate the existence of pneumoconiosis; rather, they are utilized to measure the level of the miner's disability. An x-ray *is* a measure of pneumoconiosis. Dr. Dahhan had a more recent x-ray to review. I accept that Dr. Dahhan's logic is that taken as a whole, all of the laboratory findings are as a result of cigarette smoking. This is an acceptable rationale.

I choose not to discuss Dr. Morgan's findings. They are not relevant to this discussion. I did not use Dr. Morgan's findings in evaluation and I discount Employer's argument relating to his findings.

CONCLUSION

Although Estil E. Waldroop was able to establish a material change from his previous one, based on total disability, an element of entitlement previously adjudicated against him, he

failed to prove the existence of pneumoconiosis, which is a crucial element of proof; ***Oggero v. Director, OWCP,*** *supra.* Accordingly, the subsequent claim filed on December 7, 2001, seeking federal black lung benefits, is **DENIED**.

ATTORNEY'S FEES

The award of attorney's fees for services to Claimant is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

It is hereby **ORDERED** that the claim of Estil E. Waldroop is **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).